



September 20, 2000

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department Of Public Safety  
Box 4087  
Austin, Texas 78773-0001

OR2000-3646

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138673.

The Texas Department of Public Safety (the “department”) received a request for all documents relating to a specific Administrative Inquiry. You assert that portions of the responsive documents are made confidential by various federal and state statutes or by the common law right to privacy and are, therefore, excepted from required public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure information that is made confidential by law. We have considered the exception you claim and have reviewed the documents at issue.

Initially, you argue that some of the submitted information is protected from disclosure by Title I of the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. Information obtained in the course of a “fitness for duty examination,” conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record as well. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). Furthermore, the Equal Employment Opportunity Commission (the “EEOC”) has determined that medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

You submitted as responsive to the request a file folder consisting of information relating to an employee's request for a reasonable accommodation. You also submitted an investigation file that contains additional references to the employee's disability and her request for accommodation. We conclude that the file folder must be withheld in its entirety under section 552.101 in conjunction with the ADA. We have marked information in the investigation file that must also be withheld under section 552.101 in conjunction with this statute.

You also assert that certain highlighted information contained in the investigation file is protected by a right of privacy. Section 552.101 encompasses common law and constitutional privacy and excepts from disclosure private facts about an individual. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under common law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). After careful review, we have marked the medically-related information that is protected by common law or constitutional privacy. *See* Open Records Decision Nos. 478 (1987), 455 (1987) (results of mandatory urine testing, illnesses, operations, and physical handicaps of applicants).

Additionally, we note that the submitted documents contain allegations of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently

served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* In accordance with *Ellen*, we have marked the information which must be withheld from disclosure.

The documents also contain the home addresses, home telephone numbers, social security numbers, and family member information of department employees. Section 552.117(1) excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members when the public employee requests that this information be kept confidential under section 552.024. Therefore, section 552.117(1) requires you to withhold this information of a current or former employee or official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. We recognize that some of the listed employees may be licensed peace officers who are not required to elect under section 552.024. *See* Gov’t Code § 552.117(2) (providing that a peace officer, as defined by Article 2.12 of Code of Criminal Procedure, need not comply with election requirements of section 552.024). It also appears that some of the information protected by section 552.117(2) relates solely to the requestor. Section 552.023 gives a person or a person’s authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person’s privacy interest. Therefore, section 552.023 provides the requestor a special right of access to his section 552.117 information. We also note that requestor has a special right of access to his driver’s license information as well.<sup>1</sup> *See* Gov’t Code § 552.130 (providing that certain motor vehicle information is protected from disclosure). The department must, however, withhold any section 552.117(2) information in the investigation file that does not relate solely to the requestor.

In conclusion, the department must withhold the marked information under section 552.101 in conjunction with the ADA, constitutional or common law privacy. The department must withhold the section 552.117(1) information for those employees who elected confidentiality under section 552.024. Furthermore, the department must withhold the 552.117 information of its peace officer employees even if the employees did not elect under section 552.024. However, under section 552.023, the requestor has a special right of access to his sections 552.117 and 552.130 information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

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<sup>1</sup>Section 552.130, which protects from disclosure certain motor vehicle information, was enacted to protect the privacy interests of the individual.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

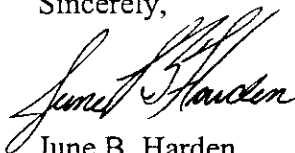
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "June B. Harden", written in a cursive style.

June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/ljp

Ref: ID# 138673

Encl. Marked documents

cc: Mr. Johnny Anderson  
4545 Dacoma Street  
Houston, Texas 77092  
(w/o enclosures)